85-1014

No.....

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1985

—o—

EDDIE LEE SMITH,

*Petitioner,*

vs.

STATE OF LOUISIANA,

*Respondent.*

—o—

**ON WRIT OF CERTIORARI TO THE HONORABLE SUPREME COURT OF THE STATE OF LOUISIANA**

—o—

## ORIGINAL APPLICATION FOR CERTIORARI ON BEHALF OF PETITIONER EDDIE LEE SMITH

—o—

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## QUESTIONS PRESENTED

(1) Whether sufficient probable cause to arrest or reasonable suspicion to detain a suspect for investigatory purposes may be found upon the basis of innocent and innocuous conduct not prohibited by statute or ordinance, and further, whether the state may be deemed to carry its burden of showing either probable cause to arrest or reasonable suspicion to support an investigatory stop, when the arresting officer is unable to:

> (i) Specifically indicate that the arrestee was engaged in any form of unlawful or prohibited activity;
>
> (ii) Offer testimonial evidence as to the results of the field sobriety test purportedly administered to the arrestee, when, said test was a necessary predicate to the subsequent D.W.I. arrest; and,
>
> (iii) Identify the accused in open court as the perpetrator of the alleged offenses, and

whether the less stringent "reasonable suspicion" standard is applicable when the arresting officer stops a vehicle with the admitted intent to issue a citation for improper lane usage.

(2) Whether officials of the State of Louisiana, i.e., the District Attorney and the Assistant District Attorney, may engage in conduct which is facially permissible when such conduct is motivated solely by the desire to deter the exercise of a constitutionally guaranteed right, viz, the right to trial by jury.

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No.....

In The

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October Term, 1985

EDDIE LEE SMITH,

*Petitioner,*

vs.

STATE OF LOUISIANA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE HONORABLE SUPREME COURT OF THE STATE OF LOUISIANA

The petition of Eddie Lee Smith respectfully requests that a Writ of Certiorari issue to review the judgment and order of the Supreme Court of Louisiana rendered in these proceedings on October 11, 1985.

## OPINION BELOW

The judgment and order of the Supreme Court of the State of Louisiana concerned herein is cited as *State v. Smith*, No. 85-KK-1542, — So. 2d — (La. 1985), unreported at the time of filing of this petition, and appended hereto as Appendix "A", page App. 1 herein.

## OTHER RELEVANT ACTIONS AND OPINIONS BELOW

(1) Judgment and order of the Louisiana Court of Appeal for the Second Circuit, dated June 27, 1985, and numbered as 17,452-KW, which denied petitioners post-trial application for supervisory writs. (See, Appendix "B", page App. 2 herein).

(2) Judgment and order of the Louisiana Court of Appeal for the Second Circuit, dated March 7, 1985, and numbered as 17,147-KW, which denied petitioner's pre-trial application for supervisory writs. (See, Appendix "C", page App. 5 herein).

(3) Citation issued for improper lane usage and driving while intoxicated. (See, Appendix "D", page App. 7 herein).

(4) Affidavit charging petitioner with driving while intoxicated. (See, Appendix "E", page App. 9 herein).

(5) Affidavit charging petitioner with improper lane change. (See, Appendix "F", page App. 11 herein).

(6) Monroe City ordinance number 33-36, defining the offense of improper lane change. (See, Appendix "G", page App. 13 herein).

(7) Transcript of the January 31, 1985, hearing conducted in connection with petitioner's pre-trial motions. (See, Appendix "H", page App. 15 herein).

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## STATEMENT OF JURISDICTION

The Louisiana Court of Appeal for the Second Circuit denied petitioner's application for a pre-trial supervisory writ to review the order of the trial court which

denied petitioner's Motion to Suppress Evidence on the basis of insufficient probable cause. *State v. Smith*, No. 17-147-KW (March 7, 1985) (page App. 5 herein).

Following petitioner's conviction, the same intermediate appellate court denied petitioner's application for a post-trial supervisory writ to review the same question. On this occasion the appellate court addressed the merits of the constitutional claim presented. *State v. Smith*, No. 17,452-KW (June 27, 1985) (page App. 2 herein). The Supreme Court of the State of Louisiana denied certiorari on October 11, 1985. *State v. Smith*, No. 85-KK-1542 (page App. 1 herein). This judgment and order represents the decision sought to be reviewed herein.

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. 2101 (d); 28 U.S.C. 1257 (3) (a ground for certiorari is found to exist where any "right, privilege or immunity is specially set up or claimed under the constitution. . ."); and Rule 17.1 (C) of the rules of this Court (a ground for certiorari is found when "A state court . . . has decided a federal question in a way in conflict with applicable decisions of this court.")

This application for writ of certiorari is timely filed within sixty (60) days of rendition of the judgment sought to be reviewed pursuant to Rule 20.1 of the Rules of this Court. This application is filed in conformity with Rule 21 of the rules of this Court.

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## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

———o———

## STATEMENT OF CASE

At approximately 3:44 a.m. on the morning of March 13, 1983, Officer Evelyn Robinson of the Monroe City Police observed a vehicle negotiate one u-turn, subsequently followed by another, in the general vicinity of Eighteenth Street and Louisville Avenue in Monroe, Louisiana. Officer Robinson, who was accompanied by Officer Randy Brown of the Monroe City Police, pursued the vehicle with the intention of issuing a citation for improper lane usage to the operator of the vehicle. (Transcript, pp. 7-10.) However, the testimony of Officer Robinson at the January 31, 1985, suppression hearing failed to indicate that the operator of the vehicle was engaged in *any* form of unlawful conduct. (Transcript, pp. 6-11 and 18.) Moreover, Officer Robinson stated that in addition to the traffic stop, she believed that the circumstances suggested a "possible D.W.I. at that time of the morning." (Transcript, p. 18.)

Officer Robinson stopped the vehicle and placed the operator under arrest. (Transcript, p. 9.) After approaching the vehicle, Officer Robinson allegedly detected the odor of alcohol on the breath of the operator, which caused her to subject him to a field sobriety test. (Transcript, pp. 10-11.) No testimony was adduced concerning the operator's performance with regard to the field sobriety test. Officer Robinson then arrested the operator of the vehicle for driving while intoxicated and for "improper lane usage." (Transcript, p. 11.)

During the January 31, 1985, suppression hearing conducted by the Fourth Judicial District Court, Officer Robinson was unable to offer a detailed physical description

of the individual she had previously placed under arrest. (Transcript, p. 16.) The State subsequently introduced a citation issued by Officer Robinson to one Eddie Lee Smith on March 13, 1983. (Transcript, p. 14.) At no point during the suppression hearing did Officer Robinson identify petitioner as either the person operating the motor vehicle on the date in question, or the person to whom she had issued the citation.

Following the events of March 13, 1983, petitioner was charged in the Monroe City Court with improper lane usage and driving while intoxicated. Petitioner immediately moved to suppress all evidence against him due to the absence of probable cause to support the initial detention. On or about July 23, 1983, petitioner moved to consolidate the pending charges pursuant to Article 706 of the Louisiana Code of Criminal Procedure; said motion being granted by the Monroe City Court. The consolidation resulted in the defendant being subject to imprisonment for more than six (6) months, and his right to trial by jury attached at this point. Petitioner then moved to quash the pending charges, claiming that the inability of the Monroe City Court to afford him a jury trial rendered the prosecution beyond the jurisdiction of the Court. See *State v. O'Dell*, 458 So.2d 1304 (La.1984).

Prior to the disposition of his Motion to Quash by the Monroe City Court, the State of Louisiana, through the District Attorney for the Fourth Judicial District, filed a single-count bill of information charging petitioner with driving while intoxicated. The affidavit pending against petitioner in the Monroe City Court was later dismissed on October 21, 1983.

Following the removal of the cause to the Fourth Judicial District Court, petitioner reiterated his earlier Motion to Suppress and filed a Motion for Jury Trial, contending that the conduct of the State was designed to frustrate his right to trial by jury. A supplemental memorandum of law was offered in support of petitioner's Motion for Jury Trial on August 27, 1984. On January 31, 1985, petitioner filed a Motion to Quash which reiterated the *O'Dell* issue previously presented to the Monroe City Court.

On January 31, 1985, the Fourth Judicial District Court, the Honorable John R. Joyce, presiding, conducted a hearing in connection with petitioner's Motion to Quash, Motion to Suppress, and Motion for Jury Trial. Following the presentation of evidence, the District Court denied each of petitioner's outstanding motions. Petitioner filed a pretrial application for supervisory writs to review the adverse ruling of the trail court pursuant to Article V, Section 10 of the Louisiana Constitution of 1974; said writ application being denied by the Louisiana Court of Appeal for the Second Circuit on March 7, 1985. *State v. Smith*, No. 17,147-KW (March 7, 1985) (page App. 5 herein).

Defendant then entered a conditional plea of guilty to D.W.I. on April 4, 1985, specifically reserving his right under *State v. Crosby*, 338 So.2d 584 (La. 1976), to once again seek review of the adverse rulings of the trial court. The Louisiana Court of Appeal for the Second Circuit once again denied petitioner's writ application which was filed pursuant to the aforementioned constitutional authority. *State v. Smith*, No. 17,452-KW (June 27, 1985) (page App. 2 herein).

Petitioner then applied to the Supreme Court of the State of Louisiana for a writ of certiorari to review the earlier order of the intermediate appellate court, pursuant to Article V, Section 5 of the Louisiana Constitution of 1974. Said application was denied on October 11, 1985. *State v. Smith*, No. 85-KK-1542 (1985) (page App. 1 herein).

This application for writ of certiorari to the Honorable Supreme Court of the State of Louisiana is timely filed within sixty (60) days of the rendition of the October 11, 1985, judgment of the Supreme Court of the State of Louisiana.

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## REASONS FOR GRANTING WRIT

This Honorable Court should grant a writ of certiorari to the Supreme Court of the State of Louisiana in this cause because:

(1). The judgment and order sought to be reviewed herein is inconsistent with the settled Fourth Amendment jurisprudence of this Court to the extent it allows probable cause to arrest to be premised upon innocent and innocuous conduct not expressly prohibited by law.

(2). The judgment and order sought to be reviewed herein, to the extent it might arguably be found to rest upon petitioner's valid arrest for a traffic offense, albeit one unauthorized by law, incorrectly allows the police authority to subsequently arrest a suspect for driving while intoxicated without first establishing a separate and independent predicate to justify said arrest.

(3). The judgment and order sought to be reviewed herein incorrectly allows the prosecuting authority, by manipulation of so-called charging discretion, to effectively deprive an accused of his constitutionally guaranteed right to a jury trial once said right has attached and vested.

———o———

## ARGUMENT

**(A). The presence of a black American citizen operating a motor vehicle on a public street during the early hours of the morning does not establish sufficient probable cause to arrest or conduct an investigatory stop, particularly when no statute or ordinance exists to prohibit the conduct allegedly giving rise to police suspicion.**

As previously noted, the arresting officer was unable to suggest that the operator of the questioned motor vehicle was engaged in any form of unlawful activity. Although the officer stated that the operator of the vehicle had negotiated two u-turns, it is urged that the officer incorrectly perceived such conduct to amount to a violation of the law. It is worth noting that "Louisiana law does not prohibit making u-turns except where expressly forbidden." See, *Trozler v. Bourg Trucking Service, Inc.*, 464 So.2d 797, 799 (La. App. 5th Cir. 1985). The state introduced no evidence to show that the questioned turns were prohibited by law.

It is extremely relevant that no statute or city ordinance existed to support petitioner's arrest for the conduct observed and cited by the arresting officer. Although petitioner was initially charged with "improper lane usage,"

such an offense was found to be nonexistent. In an apparent effort to provide facial legitimacy for the initial arrest, petitioner was subsequently charged with "improper lane change." The offense with which petitioner was actually charged provides as follows:

> "Sec. 33-36. Changing lanes on multilane streets. No driver or operator shall move from one lane to another on a street having more than one (1) lane for traffic moving in the same direction when a vehicle approaches in the lane to be turned into sufficiently near to render collision or accident probable." Ord. No. 7449 (10-26-82).

Ordinance number 33-36, the improper lane change ordinance, sets forth an offense necessarily involving another vehicle—an element obviously lacking in the instant case. The following factors clearly illustrate the total absence of an offense upon which to base probable cause or reasonable suspicion: (1). The absence of an ordinance expressly prohibiting u-turns; (2). the nonexistence of an "improper lane usage" ordinance; and, (3). the inappropriate nature of the improper lane change ordinance.

The Louisiana intermediate appellate court incorrectly perceived the officer's action to amount to an investigatory stop rather than an arrest. Of course, an arrest must be supported by probable cause, while a less intrusive investigatory stop may only be supported by reasonable suspicion. The events observed by the officer on the morning in question were insufficient to meet either standard, inasmuch as there existed no illegal conduct.

Probable cause is deemed to exist when facts and circumstances within the arresting officer's knowledge are sufficient to justify a person of average caution in the

belief that the person to be arrested has committed, or is committing an offense. Mere suspicion is not enough to justify a lawful arrest. *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319 (1983). Equivocal conduct does not afford probable cause for a warrantless arrest, if the probability of criminal conduct is no greater than the possibility of innocent behavior. *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). Probable cause hinges upon specific and articulable facts indicating criminal conduct. The mere fact that innocent behavior is observed during the late hours of the night, or early hours of the morning, may not, without more, give rise to probable cause. *Reid v. Georgia*, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980).

In *Terry v. Ohio*, 392 U.S. 1, 89 S.Ct. 1863, 20 L.Ed.2d 889 (1968), this Court recognized that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible *criminal behavior* even though there is no probable cause to make an arrest." 392 U.S. at 22, 89 S.Ct. at 1880. Later decisions of this Court have made it clear that a so-called investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in some form of *criminal activity*. *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).

Although an investigatory stop may be premised upon something less than the degree of probable cause necessary in order to effectuate a full custody arrest, such an intrusion must, nonetheless, rest upon articulable facts pointing to and suggesting *some form of unlawful conduct*. Any curtailment of a person's liberty by the police

must be supported at least by reasonable and articulable suspicion that the person is engaged in criminal activity. *Reid v. Georgia*, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980).

"In justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, supra, 392 U.S. at 21, 89 S.Ct. at 1880. A determination of such reasonable suspicion must rest upon objective factors—i.e., whether "the facts available to the officer at the moment of the seizure [would] warrant a man of reasonable caution in the belief that the action taken was appropriate." 392 U.S. at 22, 89 S.Ct. at 1880.

The Louisiana Court of Appeal for the Second Circuit found reasonable suspicion to support an investigatory stop. This finding was based upon the faulty proposition that "the very close u-turns indicated that Smith was disoriented . . ." and that such disorientation was due to drunkeness." (Page — herein). The record does not support the notion that the u-turns were made within a "very close" proximity. Moreover, disorientation does not automatically equate with drunkeness, especially in view of the officer's testimony that petitioner was from out of town and claimed to be lost. (Transcript, page 12).

The conduct of the police officer in the instant case clearly shows that petitioner was arrested, since the officer admittedly pursued the vehicle for the sole purpose of issuing a citation for improper lane usage rather than to investigate further. (Transcript, pages 8, 9, & 12). For this reason, the stricter standard of probable cause should and must govern the circumstances of this case.

The direct testimony of the officer indicated that she "pursued" the vehicle after observing the u-turns. (Transcript, page 8). A "backup" was immediately requested as soon as the vehicle was stopped. (Transcript, page 9). On cross examination the officer admitted that she perceived the u-turns to constitute "improper lane usage." (Transcript, page 12). Although the officer initially intended to issue a citation instead of effecting a full custody arrest, Article 211 of the Louisiana Code of Criminal Procedure and Louisiana Revised Statute 32:57.1 clearly indicate that such procedure was a mere substitute for the formality of a full custody arrest. The availability of this alternative in no way affects the significance of facts giving rise to an arrest in the legal sense. See, *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319 (1983) (custody is established when "a reasonable person would have believed that he was not free to leave").

The presence of a black American citizen operating a motor vehicle on the public streets at 3:44 a.m. does not establish probable cause to arrest or reasonable suspicion to conduct an investigatory stop. The officer's decision to pursue and subsequently stop the vehicle in connection with "improper lane usage," *which was not defined as an offense by statute or ordinance*, was nothing more than a rather transparent pretext for conducting a random and indiscriminate D.W.I. stop. This contention is borne out by the fact that the officer admitted that her initial impression was "a possible D.W.I. [at] that time of the morning." (Transcript, page 18). It is well settled that police officers may not, as in the instant case, create street encounters with the hope of having their subjective suspicions ripen into probable cause.

Even assuming the existence of reasonable suspicion to conduct an investigatory stop, for the sake of argument alone, the testimony of the officer, nonetheless, failed to supply any facts by which her initial investigation ripened into probable cause to arrest petitioner for driving while intoxicated. No portion of the record indicates the nature of the field sobriety test purportedly administered to the operator of the vehicle, or his performance with regard to such test. (Transcript, pages 10-11). As such, no predicate was established to support probable cause to arrest the operator of the vehicle for driving while intoxicated.

**(B). The conduct of the District Attorney for the Fourth Judicial District, in filing a single count bill of information in the wake of events attaching petitioner's right of a jury trial was patently unconstitutional, because such conduct, although authorized by Louisiana law, was undertaken for no other purpose than to deprive petitioner of his right to a jury trial.**

The facts of the instant case show that petitioner was originally charged by way of separate affidavits in the Monroe City Court with two traffic offenses arising from the same set of operative facts. Petitioner successfully moved to consolidate the offenses pending against him in the Monroe City Court pursuant to Article 706 of the Louisiana Code of Criminal Procedure, and subsequently filed a Motion to Quash based upon the City Court's lack of jurisdiction. See, *State v. O'Dell*, 458 So.2d 1304 (La. 1984) (the inability of traffic court to afford defendant a jury trial in connection with consolidated misdemeanors rendered the prosecution beyond the jurisdiction of the Court).

Before the Monroe City Court had an adequate opportunity to rule upon petitioner's Motion to Quash, the State of Louisiana, through the Office of the District Attorney for the Fourth Judicial District, filed a one-count bill of information charging petitioner with the same incident of driving while intoxicated. The consolidated charges pending against petitioner in the Monroe City Court were dismissed on October 21, 1983. On or about September 29, 1983, petitioner re-urged the Motion to Suppress which had previously been filed in the Monroe City Court. On the same date, petitioner filed a Motion for Jury Trial urging that the conduct of the State was designed to frustrate his right to a jury trial. On August 27, 1984, petitioner filed a supplemental memorandum of law in connection with his Motion for Jury Trial. Petitioner subsequently re-urged his Motion to Quash premised upon *O'Dell* on January 31, 1985.

Article 706 of the Louisiana Code of Criminal Procedure allows the trial court to order the consolidation of two or more offenses upon the motion of the defendant, when the offenses "could have been joined in a single indictment." Two or more offenses are properly charged in the same indictment or information when they "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." La.C.Cr.P., art. 493. In the instant case, the two offenses were properly joined and consolidated for trial in that they originated from one common transaction —i.e., the petitioner's alleged operation of his motor vehicle on the morning of March 13, 1983. See, *State v. Laurent,* 290 So.2d 809 (La.1974) (consolidated trial did

not constitute a substantial violation of any constitutional or statutory right where misdemeanors of unlawfully operating a motor vehicle on a public highway in a reckless manner, assault with a dangerous weapon, to-wit, an automobile, upon two different persons, and unlawfully operating an automobile on public highway in excess of speed allowed by law arose out of one single and continuous transaction). Here, both incidents were inseparably intertwined due to the fact that petitioner's allegedly improper lane usage, although a nonexistent offense, purportedly served as probable cause for arresting him for driving while intoxicated. Clearly, joinder of the offenses was the normal and proper mode of prosecution, but for the State's persistent efforts to avoid a jury trial.

In *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444 (1968), this Court held that the Sixth Amendment of the United States Constitution, as applied to the various states through the Fourteenth Amendment, required that defendants accused of "serious" crimes be afforded the right to trial by jury. This Court subsequently defined serious crimes as those in which the possible penalty exceeds six months imprisonment. *Baldwin v. New York,* 399 U.S. 66, 90 S.Ct. 1886 (1970). These basic principles were later embodied in Article I, Section 17 of the 1974 Louisiana Constitution and Article 779 of the Louisiana Code of Criminal Procedure.

Following the decision of this Court in *Codispoti v. Pennsylvania,* 418 U.S. 506, 94 S.Ct. 2687 (1974), the Supreme Court of Louisiana recognized that "where two or more charges are joined for trial the right to a jury must be determined by the total punishment which may be imposed in that case." *State v. McCarroll,* 337 So.2d

475, 480 (La. 1976). When the total aggregate punishment to which an accused is exposed exceeds six months imprisonment, the right to jury trial attaches. See, *State v. Davis*, 427 So.2d 1241 (La.App.2d Cir.1983), and, *State v. Williams*, 404 So.2d 954 (La.1981). Petitioner in the instant case preserved his right to jury trial by timely moving to consolidate the charged offenses arising from a single transaction. *State v. Comeaux*, 408 So.2d 1099 (La.1981). The ruling of the Monroe City Court which granted petitioner's Motion to Consolidate transformed the right to jury trial from a mere expectation to a vested legal right and liberty interest. Because petitioner's right to a jury trial had irrevocably attached on this occasion, it could not be dissolved by the arbitrary and capricious action which was later undertaken by the State. In *State v. Comeaux*, 408 So.2d 1099, 1105 (La.1981), the Supreme Court of Louisiana recognized that the right to jury trial would "attach if cases were consolidated where such a right might not have previously existed."

The State has resorted to conduct which is facially and ostensibly permissible for the sole purpose of depriving petitioner of his vested right to a jury trial. For the purposes of this discussion it is totally irrelevant that the District Attorney for the Fourth Judicial District and the City Prosecutor for the City of Monroe are representatives of different political subdivisions. The Parish of Ouachita and the City of Monroe are not separate sovereigns. It suffices to show that the petitioner was initially subjected to a loss of liberty and property by one political arm of the State, i.e., the City of Monroe, and now finds himself subjected to a loss of liberty and property by yet another political arm of the same State, i.e.,

the Parish of Ouachita. [illegible] semantical distinctions relied upon by the State are unconvincing in view of the significant vested right at stake. Such notions of dual sovereignty have been rejected by this Court.

Because the action of the State is clearly inspired by an improper motive, the questioned practice, although facially legitimate, is "patently unconstitutional," since its only objective is to discourage and frustrate the exercise of basic constitutional rights. This Court has consistently recognized that "if the only objective of a State practice is to discourage the assertion of constitutional rights it is patently unconstitutional." See, *Chaffin v. Stynchcombe*, 412 U.S. 17, 32, 93 S.Ct. 1977 (1973). See also, *North Carolina v. Pearce*, 395 U.S. 711, 724, 89 S.Ct. 207 (1969) (a penalty levied against those choosing to exercise constitutional rights is patently unconstitutional); *United States v. Jackson*, 390 U.S. 570, 581, 88 S.Ct. 1209 (1968) (if a provision or practice has no other purpose or effect than to chill the assertion of constitutional rights by penalizing those choosing to exercise them it is patently unconstitutional); and, *Sapiro v. Thompson*, 394 U.S. 618, 631, 89 S.Ct. 1322 (1969) (same). It should be noted that a showing of improper and discriminatory motive or purpose will always be sufficient to trigger constitutional implications. See, *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040 (1976).

Petitioner is not unaware of the provisions of Article 61 of the Louisiana Code of Criminal Procedure, which grants the District Attorney broad authority to determine "whom, when, and how he shall prosecute." Despite the rather broad authority conferred by Article 61, the District Attorney is nonetheless bound to act in good faith

within permissible constitutional limits. A state procedural rule or statute may not be applied so as to overcome or frustrate a right guaranteed by the United States Constitution. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038 (1973). "To allow the prosecution to take the questioned action under the general power conferred by Article 61 would, for all practical purposes, allow every prosecuting attorney in the state of Louisiana to amend the Constitution of the United States at his whim and effectively overrule the historical decision of the United States Supreme Court. A party may not indirectly accomplish that which it is prohibited from directly accomplishing. The fundamental right to trial by jury should not be entrusted to the unbridled discretion of those charged with the prosecution of crime.

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## CONCLUSION

WHEREFORE petitioner Eddie Lee Smith respectfully requests that this Honorable Court issue a writ of certiorari to review the October 11, 1985 judgment and order of the Supreme Court of the State of Louisiana.

Respectfully submitted,

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**APPENDIX "A"**

THE SUPREME COURT OF THE
STATE OF LOUISIANA

NO. 85-KK-1542

STATE OF LOUISIANA

vs.

EDDIE LEE SMITH

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IN RE: Smith, Eddie Lee: Applying for Writ of Certiorari and/or Review; Parish of Ouachita Monroe City Court Div. " " Number of M:52040; to the Court of Appeal, Second Circuit, Number 17,452-KW

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October 11, 1985

Denied.

JCW

JAD

PFC

WFM

JLD

FAB

HTL

Supreme Court of Louisiana
October 11, 1985

/s/ Franz LaBranch, Jr.
Clerk of Court
For the Court

**APPENDIX "B"**

COURT OF APPEAL, SECOND CIRCUIT
STATE OF LOUISIANA

NO. 17,452-KW

STATE OF LOUISIANA

vs.

EDDIE LEE SMITH

Filed June 12, 1985

On application of Eddie Lee Smith for writ of review in No. M:52040 on the docket of the 4th Judicial District Court, Parish of Ouachita, State of Louisiana, Hon. James H. Boddie, Jr., Judge

Arthur Gilmore
Assistant District Attorney — Counsel for Plaintiff-Respondent

Kidd & Kidd
by M. Dale Peacock — Counsel for Defendant-Applicant

BEFORE JASPER JONES, NORRIS and LINDSAY

SEE ATTACHED ORDER.

Shreveport, Louisiana, this 27th day of June, 1985.

/s/ _____ /s/ _____

FILED June 27, 1985.

/s/ Virginia C. Smith
Dy. Clerk

ORDER

WRIT DENIED.

The only issue in this application is whether Officer Robinson had reasonable cause to stop Mr. Smith for investigatory questioning. LSA-C.Cr.P. art. 215.1A. Mr. Smith contends that the only conduct the officer saw him make was two U-turns; that U-turns are permitted unless expressly prohibited; since they were permitted here, his conduct was lawful and could not constitute reasonable cause. We disagree.

Reasonable cause for a mere stop is satisfied by a lesser showing than is required for probable cause of arrest. *State v. Andrishok,* 434 So.2d 389 (La. 1983). The standard of reasonable cause depends on the facts and circumstances of each case; it hinges on whether those facts and circumstances imparted to the officer sufficient knowledge to warrant a stop. *State v. Belton,* 441 So.2d 1195 (La. 1983), cert. denied 104 S.Ct. 2158 (1984). In making its determination, the court may look to the "totality of the circumstances." *United States v. Cortez,* 449 U.S. 411 (1981).

Mr. Smith started westward on Louisville Avenue at 18th Street. He proceeded a short distance, made a U-turn in front of J.C. Penney, proceeded for a short distance eastward, and made another U-turn. It was 3:44 a.m. Officer Robinson pulled Mr. Smith over, whereupon Mr. Smith alit to confront the officer, who called for backup. Officer Robinson ticketed him for an improper lane change; while attending to this, she noticed the smell of alcohol on Mr. Smith, leading to the DWI arrest.

While the evidence is not overwhelming, it certainly satisfies the standard of reasonable cause. The very close U-turns indicated that Smith was disoriented. Because of the very early hour (making it unlikely that Mr. Smith was scouting for any open business establishments) and the light traffic (making Mr. Smith's actions even more obvious), the officer could plainly see that Mr. Smith was disoriented and could legitimately surmise that the disorientation was due to drunkeness.

It is of no moment that the lane change charge was dropped and that a U-turn might possibly be legal. Under the circumstances, time and place, Mr. Smith's conduct created a reasonable suspicion and justified the stop.

## APPENDIX "C"

COURT OF APPEAL, SECOND CIRCUIT
STATE OF LOUISIANA

NO. 17,147-KW

STATE OF LOUISIANA

vs.

EDDIE LEE SMITH

FILED February 15, 1985

On application of Eddie Lee Smith for supervisory writs and for a stay order in No. M:52040 on the docket of the 4th Judicial District Court, Parish of Ouachita, State of Louisiana, Hon. John R. Joyce, Judge.

Arthur Gilmore — Counsel for
Assistant District Attorney — Plaintiff-Respondent

Kidd & Kidd — Counsel for
by Paul Henry Kidd — Defendant-Applicant

Before JASPER E. JONES, SEXTON and LINDSAY, JJ.

WRIT DENIED.

The case of *State v. Jones,* 396 So. 2d 1232, relied upon by the applicant, is not applicable to the facts of this case. The state in *Jones* sought and obtained severance of two charges in one bill of information which exposed the defendant to a maximum penalty of one year imprisonment and under those circumstances he was entitled to a jury trial. The applicant here is charged with only one offense and is exposed to a maximum sentence of six months and therefore is not entitled to a jury trial. The district attorney has control of every criminal prose-

cution and therefore has the right to file only the one charge against the applicant. See C.Cr.P. Art. 61.

The case of *State v. Odell,* 458 So. 2d 1304, does not affect the district attorney's control over criminal prosecutions mandated by C.Cr.P. Art. 61.

The applicant can obtain review of the denial of his motion to suppress by application for a writ of review in the event he is convicted of the charge against him.

Shreveport, Louisiana, this 7th day of March, 1985

/s/———— /s/————

FILED March 7, 1985

/s/ Helen H. Smith
Dy. Clerk

## APPENDIX "D"

Case No. ..... Docket No. ..... Page No. .....

MN 1752376
COMPLAINT—AFFIDAVIT

STATE OF LOUISIANA )
PARISH OF OUACHITA ) SS.
CITY OF MONROE )

In the Monroe Municipal Court

The undersigned, being duly sworn upon his oath deposes and says that:

On the 13 day of March, 1983, at 3:44 A.M.

Name Smith Eddie Lee

Address P.O. Box 281 (Patton St.) Winnfield, La.

Age 40 Birth Date 5-29-42 Race & Sex B/M Ht. 6'0" Wt. 190

☐ Picked Up For Bond

Opr. Lic. No. 4109723 State La. Class A

Did unlawfully operate Buick 83 Type Veh. 2 dr. Color Wte./Mar.

Veh. Lic. No. C1004 (Dealer) State La. Year 83

Upon a public highway, namely at (Location) N. 18th @ Louisville

Located in the state, parish, city, town, village, aforesaid and did then and there commit the following offense:

Leading Causes of Accidents

NAME.....
LAST FIRST MIDDLE

| | | | |
|---|---|---|---|
| SPEEDING (over limit) (.... m.p.h. in.. m.p.h. zone) | ☐ 5-10 m.p.h. | ☐ 11-15 m.p.h. | ☐ over 15 m.p.h. |
| Improper LEFT TURN | ☐ No signal | ☐ Cut corner | ☐ From wrong lane |
| Improper RIGHT TURN | ☐ No signal | ☐ Into wrong lane | ☐ From wrong lane |
| Disobeyed TRAFFIC SIGNAL (When light turned red) | ☐ Past middle intersection | ☐ Middle of intersection | ☐ Not reached intersection |
| Disobeyed STOP SIGN | ☐ Wrong place | ☐ Walk speed | ☐ Faster |
| Improper PASSING AND LANE USAGE | ☐ At intersection | ☐ Cut-in | ☐ Wrong side of pavement |
| | ☐ Between Traffic | ☐ On right | ☐ On Hill |
| | ☐ Lane Straddling | ☐ Wrong lane | ☐ On curve |
| ☐ Following too closely | ☐ Failure to yield | | |

Other Violations

In Violation of Section 33-2.79 Improper Lane Usage 12-221 DWI of

☐ State Statute ☐ Local Ordinance in such case made and provided.

The undersigned further states that he has just and reasonable grounds to believe, and does believe, that the person named above committed the offense herein set forth, contrary to law in such case made and provided and against the peace and dignity of the same.

Sworn to and subscribed before me this .. day of ....., 19..

/s/ PFC E. Robinson
Name & Title Signature of Complainant

Court appearance: .. day of ....., 19.., at .... M

I hereby promise to appear at the time and place specified above:
(Defendant's Signature) Arrested

MN 1752376

Directions that Increased Seriousness of Violation

| | | | |
|---|---|---|---|
| SLIPPERY PAVEMENT | ☐ Rain<br>☐ Snow<br>☐ Ice | CAUSED PERSON TO DODGE | TYPE ACCIDENT<br>PD PI FATAL<br>☐ ☐ ☐ |
| | ☐ Night | ☐ Pedestrian | ☐ Ped ☐ Vehicle |
| DARKNESS | ☐ Fog<br>☐ Snow<br>☐ Cross | ☐ Driver<br>☐ JUST MISSED ACCIDENT<br>..... | ☐ Hit Fixed Object<br>☐ Right Angle<br>☐ Head on<br>☐ Sideswipe<br>☐ Rear end<br>☐ Ran off Roadway<br>☐ Intersection |
| OTHER TRAFFIC PRESENT | ☐ Oncoming<br>☐ Pedestrian<br>☐ Same Direction | | |

AREA ☐ Business ☐ Industrial ☐ School ☐ Residential ☐ Rural

HIGHWAY TYPE: ☐ 2 lane ☐ 3 lane ☐ 4 lane ☐ 4 lane divided

## APPENDIX "E"

AFFIDAVIT

CITY COURT OF THE CITY OF MONROE

STATE OF LOUISANA
PARISH OF OUACHITA

DOCKET # —

The complaint of Catherine Washington, of the City of Monroe, Parish aforesaid, taken under oath before me, the undersigned authority, deposes and says that Eddie Lee Smith, residing at P.O. Box 281, Winnfield, La., in the City of Monroe, Parish aforesaid, on or about the 13th day of March A. D. 1983

Mar. 14, '83 A #6516
CB $600.00 fx 4-4-83

DID OPERATE A VEHICLE OR OTHER MEANS OF CONVEYANCE WHILE UNDER THE INFLUENCE OF ALCOHOLIC BEVERAGES, NARCOTIC DRUGS, CENTRAL NERVOUS SYSTEM STIMULANTS, HALUCINOGENIC DRUGS OR BARBITUATES.

DISPOSITION BY COURT

Plea Entered: Guilty ..... Not Guilty √ C. C.
$ ..... Cash Bond Order Forfeited $ .....
Verdict: Guilty as Charged ..... Not Guilty .....

Sentenced By Court To:

Pay a Fine of $..... or in Default
..... Days in Jail.
To Serve Compulsory Jail Sentence of ..... $ .....
Days in Jail.

contrary to Section No. 12-221 of the City of Monroe Code (Ordinance 3263 as amended), in such cases made and provided and against the peace and dignity of the same.

Sworn to and subscribed before me, this 14th day of March A. D. 1983.

WITNESSES:

Sgt. Heems
E. Robinson
M. Walker
T. Taylor

*Refused PEI

/s/ C. Washington
/s/ D. Haddad
(Dy.) Clerk, City Court of the City of Monroe

## APPENDIX "F"

AFFIDAVIT

CITY COURT OF THE CITY OF MONROE

Atty. Paul Kidd

STATE OF LOUISIANA
PARISH OF OUACHITA

DOCKET # 45

The complaint of Catherine Washington, of the City of Monroe, Parish aforesaid, taken under oath before me, the undersigned authority, deposes and says that Eddie Lee Smith, residing at P. O. Box 281, Winnfield, La., in the City of Monroe, Parish aforesaid, on or about the 13th day of March A. D. 1983

Mar. 14, '83 A # 6511
CB $600.00 3-25-83 fx 4-4-83 reset 5-2-83

IMPROPER LANE CHANGE

DISPOSITION BY COURT

Plea Entered Guilty ..... Not Guilty √ C. C.
$ ..... Cash Bond Order Forfeited $ .....
Verdict: Guilty as Charged ..... Not Guilty .....

Sentenced By Court To:

Pay a Fine of $..... or in Default
..... Days in Jail.
To Serve Compulsory Jail Sentence of ..... $ .....
Days in Jail.

contrary to Section No. 33-2.79 of the City of Monroe Code (Ordinance 3263 as amended), in such cases made and provided and against the peace and dignity of the same.

Sworn to and subscribed before me, this 14th day of March A. D. 1983.

WITNESSES:

E. Robinson
R. Brown
M. Walker

/s/ C. Washington
/s/ D. Haddad
(Dy.) Clerk, City Court of the City of Monroe

Refused PEI Test

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## APPENDIX "G"



* * *

(4) No operator of any vehicle other than an emergency vehicle shall:

(a) Pass any vehicle in a funeral procession proceeding in the same direction;

(b) Drive across the path of any vehicle in a funeral procession except where and when such procession is separated by a police officer for the purpose of permitting such crossing;

(c) Cut into a funeral procession.

(5) When properly escorted by a police officer and when directed so to do by such police officer, a funeral procession (including every vehicle therein maintaining proper illumination and interval) shall proceed through stop signs and red or yellow traffic signal lights, provided that every operator of a vehicle in such procession shall proceed with caution into or across any intersection where such vehicle would not have right-of-way if not in a funeral procession.

(6) Every funeral procession shall move only on and along the route designated by the police officer escorting such procession, or the route prescribed by the police department when such procession is not escorted by a police officer. (Code 1958, § 24-45.13)

Sec. 33-36. Changing lanes on multilane streets.

No driver or operator shall move from one lane to another on a street having more than one (1) lane for traffic moving in the same direction when a vehicle approaches in the lane to be turned into sufficiently near to

render collision or accident probable. (Ord. No. 7449, 10-26-82)

Sec. 33-37. Automatic signal light—Proceeding on red.

Where and when the movement of vehicles is being controlled by automatic signal lights irrespective of right-of-way otherwise herein conferred, no driver or operator shall operate a vehicle into a street intersection where and when the RED or STOP signal faced by such driver or operator is illuminated, except as follows:

* * *

Supp. No.2

## APPENDIX "H"

(p. 1) STATE OF LOUISIANA STATE OF LOUISIANA
VS. NO. M:52040 PARISH OF OUACHITA
EDDIE LEE SMITH FOURTH DISTRICT COURT

BE IT KNOWN AND REMEMBERED that on the Motions to Quash, Motion to Suppress, and Motion for Jury Trial in the above styled and numbered case in the Fourth District Court, Parish of Ouachita, State of Louisiana, on the 31st day of January, A.D. 1985, before Honorable John R. Joyce, Judge, at Monroe, Louisiana, the following note of evidence adduced and proceedings had, was taken, to-wit:

APPEARANCES: Mr. Arthur Gilmore, Assistant District Attorney, Ouachita Parish, Monroe, Louisiana
Attorney for the State

Mr. Paul Henry Kidd, Sr., Attorney at Law, Monroe, Louisiana
Attorney for the Defendant

(p. 2) By Mr. Gilmore: Your Honor, we have on the misdemeanor motions Eddie Lee Smith.

By Mr. Kidd: Judge, at this time we file a new Motion to Quash. This is actually Mr. Peacock's case, and he's sick and I'm standing in for him. But we have a Motion to Quash that was based on the statute of limitations, but we file this morning a Motion to Quash predicated on—actually it's reurging a Motion to Quash that we filed in Monroe City Court. These charges were instituted—the Court may have my motion—

By Mr. Gilmore: —Your Honor, I'm going to object to any motion being filed at this time as being untimely

as to this Motion to Quash Mr. Kidd is apparently trying to introduce.

By Mr. Kidd: Judge, we already have a pending Motion to Quash. and I don't even think it's necessary to refile another because it should be in the record. I think Mr. Gilmore has it. This is simply—relates back to the same thing that the other motion does. But March 14th of '83 Mr. Smith was charged with DWI and—by separate count and (p. 3) also improper lane change. On June the 11th of '83 we filed a motion to consolidate those two counts, and the court granted our Motion to Consolidate. Thereafter we filed a Motion for Jury Trial and we filed a Motion to Quash predicated on the fact that Monroe City Court did not have jurisdiction to try a jury trial. Before that court could rule—the Monroe City Court could rule on that matter Mr. Armstrong who was city attorney dismissed the charges, and then the one charge was filed in this court, and we have since that time filed various motions. But the case of "State vs. Odell" is directly on point. The same thing occurred in that case. There were two different charges. They were not combined. The defendant filed a Motion to Quash—I mean to Consolidate. The charges were consolidated. He then filed a Motion to Quash on the ground that the court did not have jurisdiction. The trial court in that case denied the motion. In this case the court—the Monroe City Court never had a chance to rule on that. We (p. 4) submit that they cannot go by the back door and attempt to undo what was done. Now what happened was we filed this motion sometime in July of '83 and we thought the case was over with. Well then in September these charges were instituted where they dropped the improper lane change. Now the question is

whether or not the charges were separately instituted, and they were separately instituted, and once they were consolidated and the right to a jury trial attached, our Motion to Quash has been granted, and that's exactly what Odell states.

By Mr. Gilmore: Your Honor, the state is not in a position to respond to that and inasmuch as we control the docket, the state would rather take up the Motion to Suppress at this time instead of hearing this Motion to Quash and which we objected to, and I think it is our prerogative to handle which motion we desire.

By the Court: I think I've handled a very similar matter and the Second Circuit has ruled on a matter exactly in point and I'm going to allow the filing (p. 5) of the motion and consider it submitted. I think that I understand the arguments and the positions of counsel in this regard, and I'm going to—

By Mr. Gilmore: —Your Honor, in that case then the state would like to respond if you're going to allow the motion.

By the Court: Okay, well go ahead and respond then.

By Mr. Gilmore: Inasmuch as the City of Monroe dismissed charges over there and it was transferred over—and the state picked up—filed new charges charging DWI first offense, it is up—it's the prosecutor's discretion as to whether or not to—to allow the Motion to Quash to be heard over in Monroe City at which time the prosecutor decided well he'd just dismiss the charges, and we reinstituted charges over here in this District Court thereby anything they held back in Monroe City Court is of no moment as to what happened—as to these proceedings here.

By Mr. Kidd: Judge, I will respond, but I—if the Court is familiar, there's no need in my responding.

By the Court: I'm very familiar with it, and I (p. 6) will—I hope that I can get that information at noon and rule on this aspect at 1:30. I want to get that case cite out of Second Circuit. Can we go ahead with the Motion to Suppress now.

By Mr. Gilmore: The state will call as its first witness Officer Robinson.

By Mr. Kidd: Judge, I'd ask the witnesses be sequestered.

By the Court: Other witnesses, Mr. Gilmore?

By Mr. Gilmore: That's the only witness I'm going to call, Your Honor.

EVELYN ROBINSON, a witness, called on behalf of the State, first duly sworn, testified as follows:

DIRECT EXAMINATION

*By Mr. Gilmore:*

Q. Will you state your full name and occupation for the record please?

A. Evelyn Robinson, police officer, Monroe City Police Department.

Q. And how long have you been so employed?

A. Just—almost three years.

Q. And were you so employed on March 13, 1983?

A. Yes, I was.

Q. And what were your present duties and responsibilities at that time?

A. I was a patrolman.

(p. 7) Q. And were you operating a patrol unit approximately 3:44 a.m. on that particular day?

A. Yes, I was.

Q. And during this time did you have occasion to execute a stop—

By Mr. Kidd: —Excuse me. Don't—I object to leading the witness. It's suggestive.

By the Court: Refrain from suggesting any answers.

Q. Do you recall whether or not you were patrolling at this particular time?

A. Yes, I was.

Q. And where was that location?

A. I was stationary there at Eighteenth and Louisville in the J.C. Penney parking lot.

Q. Okay, and did you have the—that's at J.C. Penney parking lot?

A. Yes.

Q. And did you have the occasion to come into contact with a one Eddie Lee Smith at that location?

A. Farther down Louisville, yes, I did.

Q. What, if anything, drew your attention to the individual known as Eddie Lee Smith or to his vehicle?

A. I'm not sure. I'm thinking that he came north on Eighteenth—

By Mr. Kidd: —I'm going to object to any surmisal of anything from wherever—what—she can testify as to what she knows not what she thinks.

Q. Did you have the occasion to write a report out?

A. Yes, I did.

Q. Do you have that report with you at this time?

A. Yes, I do.

(p. 8) Q. Would you—will it help if you reflect on that report to determine—to refresh your memory?

A. No, I believe I can do it without it.

Q. Okay, go ahead on then.

A. I observed the vehicle traveling west on Louisville. It got up a little bit in front of J.C. Penney and made a U-turn in the middle of the road heading back east, and then the vehicle made another U-turn before it got back to Eighteenth Street and made another U-turn headed back west. At that time I pursued the vehicle.

Q. Okay. And do you recall—how long did it take you to stop this vehicle?

By Mr. Kidd: I object to that. That's irrelevant that she's ever tried to stop it?

By Mr. Gilmore: I think the officer stated that she pursued the vehicle.

By Mr. Kidd: She didn't say she pursued. That's leading and suggestive. She said she—after he made the U-turn she—

By the Court: —I believe she did say she pursued the vehicle after the second—

By Mr. Kidd: —I'm sorry. I'll withdraw it.

A. I'm not sure. I did get him stopped at—

By Mr. Kidd: —If you're not sure—

A. —I know where I got him stopped, at Scott-Hixson Ford.

By Mr. Gilmore: Your Honor, I would object to Mr. Kidd—

By Mr. Kidd: —If the Court please, if she's not sure, it's opinion. I object—

(p. 9) By the Court: —Well she's answered that she knows that she stopped him at Scott-Hixson Ford.

Q. And upon stopping the vehicle what did you do?

A. The driver stepped out, and I asked for a backup, at which time another officer came to the scene.

Q. And was this individual subsequently arrested?

A. Yes, he was.

Q. On what charge was he arrested?

A. Improper—

By Mr. Kidd: —I'm going to object to what charge. This is probable cause, Judge, whether or not for the DWI. He's charged with DWI not improper lane change.

By Mr. Gilmore: I think the motion addresses itself to whether there was probable cause for the stop and whether any statements or—statements made, seeking to suppress statements and/or test results.

By Mr. Kidd: What's happened is the state has responded in its motion—for our Motion for Bill of Par-

ticulars and Discovery that there were no statements. Now is that going to be changed?

By Mr. Gilmore: There were no statements. There were no tests.

By Mr. Kidd: Then it's irrelevant, Judge.

By Mr. Gilmore: Your Honor—

(p. 10) By the Court: What's your question?

By Mr. Gilmore: On what charge did—was he subsequently arrested?

A. Yes, he was.

Q. And on what charge?

By Mr. Kidd: Well wait, excuse me. Judge, this is —he said he has one witness. I asked for sequestration. Now whether he's arrested doesn't—on murder or whatever doesn't have to do—anything to do with probable cause in this matter. She has testified I think very clearly that if she made an arrest for something, for U-turn or something, that's perfectly permissible, but he hasn't asked her if she made arrest or whether she's fixing to say some hearsay or something another. The proper question is did she make an arrest. That's the next question. Did she stop him and make arrest. She says she called for backup. So it's presumed unless she lays a predicate that she didn't make the arrest.

By the Court: Ask her directly about her involvement, Mr. Gilmore?

Q. What did you do after you called for backup?

A. We performed a field sobriety test on him because I did detect (p. 11) an odor of alcohol on his breath, and he was later arrested by myself.

Q. And was there any advisal of the—of rights at that time?

A. Yes he was.

Q. And by whom?

A. By myself.

Q. And what rights did you advise him of?

A. I advised his Miranda rights.

Q. And to your knowledge—what is the individual's name who you stopped on that particular evening?

A. Eddie Lee Smith.

Q. And how did he identify himself to you?

A. He identified himself as Eddie Lee Smith. He showed me his driver's license, produced a driver's license.

By Mr. Gilmore: I have no further questions. Oh, one other question.

Q. In what parish was this located in?

A. Ouachita Parish.

By Mr. Gilmore: I have no further questions.

CROSS EXAMINATION

*By Mr. Kidd:*

Q. Ms. Robinson, you work for the City of Monroe?

A. Yes, I do.

Q. And what you have observed—what vehicle did you observe? What was the vehicle you observed?

A. Á Buick, I'm not sure.

Q. Not sure. What color was it?

A. I don't know.

(p. 12) Q. What model was it?

A. I don't know.

Q. Four door, two door?

A. I don't know.

Q. Don't know. What kind of license tag did it have on it, do you remember?

A. Dealer I believe.

Q. Dealer. Is it true or not true that you thought that he had made an improper lane change?

A. Improper lane usage.

Q. Improper lane usage?

A. Yes.

Q. And did you determine that he was from out of town?

A. Yes

Q. That he was from Winnfield?

A. Uh-huh.

Q. That he worked for a car dealership in Winnfield, is that correct?

A. Uh-huh. Yes.

Q. And did you determine he had been lost—he had been in Monroe and had gotten lost?

A. Yes, he did mention that.

Q. Have you ever been lost?

By Mr. Gilmore: I object, Your Honor, that's irrelevant.

By Mr. Kidd: Excuse me, I'd withdraw that question.

Q. But what you're saying is whatever it was that you stopped, whatever car it was, and whoever might have been in it, you stopped for improper lane usage, right?

A. Yes.

(p. 13) Q. And that's it? Is that right or wrong?

A. The initial stop, yes—

Q. —That's it. Ma'm?

A. The initial stop, yes.

Q. The initial stop. You had no reason to suspect did you—well I'll withdraw that question.

By Mr. Kidd: That's all I have.

RE-DIRECT EXAMINATION

*By Mr. Gilmore:*

Q. Officer Robinson, did you have the occasion to issue a written citation to that individual—

By Mr. Kidd: —Judge, I object to that. That's irrelevant. That's not probable cause, anything to do with it.

By Mr. Gilmoré: Your Honor, if I be allowed to continue this line of questioning—

By Mr. Kidd: —Well I object as being irrelevant.

By the Court: Well I think you asked the question, Mr. Kidd, did she stop him solely for improper lane change or improper lane usage, and if he—if there was a citation issued for that, I think he—you've opened the door, he can ask that question.

By Mr. Kidd: Well the document would be the best evidence, Judge.

Q. Officer Robinson, I show you what I've marked as S-1 just for identification purposes and ask if you can identify it.

(p. 14) A. Yes, I do.

Q. Are there any signatures on there that you can recognize?

A. Yes, it is.

Q. And whose signature is that?

A. It's my signature.

Q. And what is that?

By Mr. Kidd: I believe the document is the best evidence of its contents.

Q. For the record?

A. It's a citation.

Q. A citation?

A. A copy—

By Mr. Kidd: —Excuse me, I—the Judge hasn't ruled on my motion. The document is the best evidence.

By the Court: She can identify it roughly as a copy of the uniform citation. The best evidence of what is contained therein is on the document.

Q. And did you have the occasion to—is this the same citation that you issued to—on that night to Eddie Lee Smith?

A. Yes.

Q. And the information that's on this document where did you obtain this information from?

A. It's going to be his—partially from his driver's license and then from the vehicle itself.

Q. And what other information is on this particular citation or copy?

By Mr. Kidd: The Court has already ruled on that.

By the Court: The contents of what's contained (p. 15) in that is the best evidence of what is there. I can read.

By Mr. Gilmore: The state at this time would offer to introduce S-1 into evidence.

By Mr. Kidd: Judge, I'd like to have the occasion to—

RE-CROSS EXAMINATION

*By Mr. Kidd:*

Q. Now you say you don't remember what model car it was?

A. No.

Q. You don't remember whether it was two door or four door?

A. No.

Q. You don't remember whether the license plate was Louisiana or what it was, it was a dealer's license, is that correct?

A. Yes.

Q. How do you know that this was the person in the car that you stopped that this piece of paper is related to? How do you know that right now?

A. I know my handwriting.

Q. I understand that. I'm not denying you wrote this ticket. My question is how do you know that this is the date in question? That we're talking about the same thing. How do you know that?

A. It's got it on there, same date, time, and everything.

Q. What was the date?

A. 3rd of—13th of what, May.

Q. Of what?

A. March, 13th of March.

Q. What year?

(p. 16) A. '83.

Q. What did he—what did this person look like?

By Mr. Gilmore: I would object, Your Honor, going beyond—

By Mr. Kidd: —Well, Judge, it's a question of probable cause if this is—

By Mr. Gilmore: —Probable cause for the stop not for the—

By Mr. Kidd: —Well if we're talking about the same person.

By Mr. Gilmore: I think—

By the Court: —I'll let her answer if she recalls what he looks like.

A. Black guy, heavy set. He wasn't very tall, maybe 5'9" or 5'10".

Q. 5'9" or 5'10".

A. Heavy set.

Q. Not 6', he wouldn't be that tall?

A. I don't know. I'm not sure. He wasn't much taller than I, I know that.

Q. How much did you say he weighed?

A. I don't know. All I know is he was heavy set.

Q. What did he have on?

A. I don't know. Clothes, that's all I know.

Q. What color was his hair?

By Mr. Gilmore: Your Honor, I would object to that.

By Mr. Kidd: That's identification, Judge.

By the Court: Well I'm going to let you answer the question. I don't—with you having the ticket and asking her questions and asking her to (p. 17) remember since '83 I don't know how much weight the Court gives it, but you can ask the questions.

Q. Remember?

A. No.

Q. Now you said this stop was in front of Hixson Ford?

A. Uh-huh.

Q. You're sure about that?

A. Uh-huh.

Q. Positive?

A. Uh-huh.

Q. Why would you have written North Eighteenth and Louisville?

A. That's where the initial—that's where he violated the law. That's where he made the initial—

Q. —Oh, he made a U-turn there?

A. Along there, yes.

Q. And that's what you were writing up, the U-turn at North Eighteenth and Louisville, right?

A. Beg your pardon?

Q. That's what you were writing on this ticket?

A. I've got DWI there also.

Q. Well how did you know it was a DWI, that's my question, at North Eighteenth and Louisville?

By Mr. Gilmore: Your Honor, I would object. That's irrelevant as for probable cause for the stop.

By Mr. Kidd: Judge, the cases which say that probable cause, following a block or whatnot, and she hasn't indicated anything but a U-turn—

By Mr. Gilmore: —I think she has testified that (p. 18) he made--the individual made two U-turns, not only one, but a U-turn going east and a U-turn—

By the Court: —I'm well aware of the testimony, Mr. Gilmore. Answer the question how—do you know that he was DWI at that point.

Q. At North Eighteenth and Louisville?

A. No.

Q. You didn't have any idea. You thought maybe he was either lost or what? What did you think?

A. I didn't know. Possible DWI that time of the morning, yes.

Q. Possible DWI?

A. Uh-huh.

Q. What grounds for that? Time of the morning?

A. Not necessarily. That does have something to do with it. Someone making that type of turn, and traffic is very light that time of the morning.

Q. Now he was not weaving across the line?

A. I don't know. I could not see him—the lines, his car just to the lines from where I was.—

Q. —You couldn't see them. All you saw was a U-turn?

A. Uh-huh.

Q. Did you make the arrest?

A. Yes, I did.

Q. Who was with you?

A. Officer Randy Brown.

Q. Who?

A. Officer Randy Brown.

By Mr. Kidd: That's all I have. Judge, my objection would go to the weight (p. 19) and not to the admissibility.

By the Court: Let S-1 be admitted without objection.

By Mr. Gilmore: The state rests. Your Honor. No other witnesses.

By Mr. Kidd: Judge, we have no witnesses.

By the Court: Thank you, you may step down. The Court will rule on this at 1:30 when it rules on the Motion to Quash.

By Mr. Gilmore: He also filed a Motion for Jury Trial, Your Honor, in the same matter.

By Mr. Kidd: Judge, that sort of relates to my other matter, but I also have another Motion to Quash, and I'd ask the Court consider the—it goes back to that matter, and I think ruling on a Motion to Quash will ultimately take care of that. So I at this time from the standpoint of what the Court does—if the Court rules against me, I think it would deny me a jury trial, and so I—I will forego that aspect.

By the Court: Just submit it.

By Mr. Kidd: The other question I think it statute of limitation Motion to Quash.

By Mr. Gilmore: That's correct, Your Honor. It (p. 20) don't appear on today's docket but it should be. A Motion to Quash was filed at the last time this matter was set alleging that the statute of limitations for institution of prosecution had expired or something to that effect. But one year has passed since the prosecution was instituted against the defendant.

By Mr. Kidd: Judge, I don't know of anything that Mr. Gilmore contradicts in our motion. If it is, I'll address myself to it. It's a handwritten motion too, Judge.

By Mr. Gilmore: According to the—the defendant was arraigned on—the defendant was arrested on September 10, 1983, and arraigned on September 23, 1983, at which time it was set for trial for November the 8th. On November 8, 1983, it was continued by joint motion and a Motion to Suppress was filed December 22, 1983. Also a Motion for Jury Trial was filed December 22, 1983. And the—basically the state—it's the state's position that once the matter—once a motion was filed that it suspended the running of the statute of limitations, (p. 21) suspended the time for running it, and until that motion was disposed of, the time then began to run anew, and—

By Mr. Kidd: —Judge—go ahead. I'm sorry.

By Mr. Gilmore: And this being filed—the motion was filed back on December 22, 1983, and the Motion for Jury Trial was filed at that same time, and it wasn't heard till December 1st—I mean February 1, 1984, and which it was overruled according to the records we have here. The

Motion to Suppress which was filed back in '83 is just being heard today, and I think that this motion to—that all of these continuances and refixing and the filing of these different motions suspended the running of the execution of—the running of the time to institute—to bring this matter to trial.

By Mr. Kidd: Judge, what occurred was that the charges were instituted on March 14, 1983, in city court, and what happened, as we've explained in our other motion, on September 26, 1983, while those charges were still pending over in city court—still pending. They were not (p. 22) dismissed until October 21st.—they instituted proceedings over here. So the date begins to run from March 14, 1983, and if the computation—the Court—it's in the record from the proceedings. Certainly more than a year has passed from the time the institution of the proceeding. Even with the interruption that he talks about more than one year has passed and under Article 578 3 trial was not commenced within one year in a misdemeanor case from the date of the institution of the prosecution. It's a question of whether the Court—Mr. Gilmore's right if we look only to the September charge, but we're not talking about September. This charge was initially instituted on March 14, 1983.

By Mr. Gilmore: Your Honor, this charge was instituted in March—those charges that Monroe City had were dismissed. So you have—even back at that point he had filed a Motion to Quash, a Motion to Suppress, and also a Motion to Consolidate. All those motions suspended the running of the time even if we go (p. 23) back, which I don't think that we should go back to the Monroe City charges since they were subsequently dismissed.

By the Court: Thank you, gentlemen, I will rule if I have time—I hope I have time during the lunch hour—on all motions pending, the two Motions to Quash, the Motion to Suppress, and a Motion for Jury Trial.

By Mr. Kidd: Thank you, Judge.

By the Court: Yes, sir.

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STATE OF LOUISIANA
PARISH OF OUACHITA

I HEREBY CERTIFY that the foregoing pages numbered one (1) to twenty-three (23), both inclusive, contain a true and correct transcript of my Sony tapes of the proceedings in the case of "State of Louisiana vs. No. M:52040 Eddie Lee Smith" on the 31st day of January, A.D., 1985, in the Fourth District Court, Parish of Ouachita, State of Louisiana, before Honorable John R. Joyce, Judge, at Monroe, Louisiana.

IN TESTIMONY WHEREOF I sign hereto this 5th day of February, A.D., 1985.

/s/ Ginger C. Gulett
Official Court Reporter for the
Fourth District Court, Parish of
Ouachita, State of Louisiana